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NO. 2534

United States  
Circuit Court of Appeals  
For the Ninth Circuit

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LARKIN-GREEN LOGGING COMPANY, a Corporation,

Appellant.

vs.

R. L. SABIN, as Trustee in Bankruptcy of the  
Estate of CONSUMERS' LUMBER & SUPPLY  
COMPANY, a Corporation,

Respondent.

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BRIEF OF RESPONDENT.

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STATEMENT OF THE CASE.

The statement of facts as contained in appellant's brief is essentially correct. However, it is deemed advisable to state the facts from a different angle and according to the manner in which the questions arose in this case.

Respondent, R. L. Sabin, was elected trustee in bankruptcy of this estate to supplant a former trustee, who had resigned because of criticism concerning his

inactivity. Upon his election there was turned over to him certain property consisting of a lumber mill near Portland, Oregon. After taking possession of the same the trustee found that an execution was being demanded in the State Court by the appellant upon a judgment obtained by it against the bankrupt, within four months of the filing of the petition in bankruptcy, and that the sheriff had been requested to make sale of said property, which had been attached by appellant prior to the obtaining of its judgment. Thereupon, respondent petitioned and procured from the District Court authority to institute suit against appellant for the purpose of enjoining it from proceeding with its execution sale, and this suit was accordingly instituted. (See Amended Complaint, Transcript of Record, pp. 3 to 25.)

The amended complaint in this suit set forth the *Petition in Bankruptcy* filed against the Consumers' Lumber & Supply Company (Transcript of Record, pp. 4 to 10); the *Demurrer* of the Larkin-Green Logging Company to said petition in bankruptcy (Transcript of Record, pp. 11 to 12); the *Decision* of the District Court *overruling* said demurrer (Transcript of Record, p. 13); the *Answer* of the bankrupt admitting the allegations of said petition in bankruptcy and praying to be adjudged a bankrupt (Transcript of Record, p. 14); the *Adjudication* in bankruptcy by said court (Transcript of Record, p. 15); the fact that *no* motion had been filed to vacate, set aside, or modify said adjudication; that *no appeal* or writ of error or writ of review had been taken from said order of adjudication or from

any proceeding in said bankruptcy cause; and that said adjudication had *not* been vacated, set aside, or modified (Transcript of Record, p. 16); the *Reference* of said cause to the referee in bankruptcy (Transcript of Record, p. 16); and the *Proof of Claim* filed by appellant with said referee in said cause as an *unsecured* claim (Transcript of Record, pp. 16 to 21); the fact that the claim made in said proof was the *same* claim upon which suit had been instituted in the State Court and attachment issued and execution threatened (Transcript of Record, p. 21); the fact that the appellant *participated in the election of a trustee* at the first meeting of creditors in said bankruptcy cause as an *unsecured creditor* (Transcript of Record, p. 21); the *qualification of the trustee* (Transcript of Record, p. 22), and his authority to make sale of the property involved (Transcript of Record, p. 22); the fact that the trustee was embarrassed and *deterred in making suitable sale* by the action of the appellant, *a year and a half subsequent to the adjudication*, in asserting its claim by reason of said attachment and in threatening execution and sale under its judgment (Transcript of Record, p. 23); and the *authority of the trustee to sue* (Transcript of Record, p. 24.)

The appellant moved to dismiss this complaint upon the general ground that the District Court had no jurisdiction in the bankruptcy cause, and that therefore the adjudication thereunder was void (Transcript of Record, p. 26). The court, after hearing arguments upon said motion to dismiss, entered an order denying same (Transcript of Record, p. 29), handing down a

written opinion therein (Transcript of Record, pp. 30 to 35). Whereupon, final decree was entered enjoining the appellant from proceeding with its attachment, execution and sale (Transcript of Record, p. 36.)

### CONTENTION OF APPELLANT.

No assignment of errors is set forth in the brief as required by the rules of the Circuit Court of Appeals for the Ninth Circuit (Rule 24), but it will be seen from a reading of appellant's brief and from the opinion filed in the lower court, that the ground upon which appellant relies to sustain its position that the court was without jurisdiction to adjudicate the Consumers' Lumber & Supply Company a bankrupt, is that in the involuntary petition in bankruptcy filed in said cause the only act of bankruptcy alleged has been subsequently held in a direct proceeding in another case, by the Supreme Court of the United States (*Citizens Banking Company v. Ravenna National Bank*, 234 U. S. 360; 34 Sup. Ct. Rep. 806), not to constitute an act of bankruptcy, it being the contention of appellant that in order to give a court of bankruptcy jurisdiction, the petition must not only allege the residence, domicile, and place of business of the bankrupt as within the district for the requisite time, the character of the person or corporation petitioned against, the amount of debts owing as

over one thousand dollars, and the fact that the three, or more, petitioning creditors together hold five hundred dollars or more of provable claims, but also a *valid act of bankruptcy*, and that the failure to allege in the petition any one of these facts leaves the court without jurisdiction to adjudicate.

## POSITION OF RESPONDENT.

Respondent contends that the District Court had jurisdiction in the bankruptcy cause whether or not the petition alleged a valid act of bankruptcy, and having jurisdiction, even though the decision were erroneous, after adjudication, it could not collaterally be attacked.

## DISCUSSION.

### APPELLANT'S "POINTS AND AUTHORITIES."

It is admitted at the outset that many of the doctrines and statements of law set forth in appellant's

brief are a correct exposition of abstract principles. It is the *application* of these principles to the *case at bar* which creates the issue. All of the *general* statements of law set forth in appellant's brief under "Points and Authorities" may be admitted:

Paragraph I of said "Points and Authorities" merely quotes several sections of the bankruptcy act not in controversy.

Paragraph II thereof is a list of authorities which, insofar as relevant, will be hereafter discussed.

Paragraph III contains a general statement of law which is admitted, viz.: That an

"Adjudication, if within the jurisdiction of the court, is voidable upon direct attack, but conclusive against collateral attack; if not within the jurisdiction and the record affirmatively shows a lack of jurisdiction, it is void for all purposes."

In view of the decision of *Citizens Banking Company v. Ravenna National Bank*, 234 U. S. 360, 34 Sup. Ct. Rep. 806, the correctness of paragraph IV of said "Points and Authorities" is also admitted, viz.: that

"The petition for involuntary bankruptcy filed against the Consumers' Lumber & Supply Company and upon which adjudication was made, alleged but

one act as an act of bankruptcy and that is not an act of bankruptcy under the statute."

Paragraph V of said "Points and Authorities," to the effect that the adjudication in the instant case was null and void and is therefore subject even to collateral attack, is the question at issue.

Paragraph VI of "Points and Authorities" of appellant is freely admitted, viz.: that

"A want of jurisdiction affirmatively appearing on the face of the record cannot be cured nor a judgment rendered on such record validated by consent, appearance, ratification, or estoppel."

It may be seen, therefore, as heretofore stated, that it is merely in the application of admitted principles to the case at bar that appellant and respondent disagree.

#### JURISDICTION OF THE FEDERAL COURTS IN BANKRUPTCY PROCEEDINGS.

It is believed that appellant, in its brief, concedes that the federal courts in bankruptcy, although of

limited jurisdiction, in a sense, are yet courts of general jurisdiction, and that their decisions are within the general rule that where it appears that the court had jurisdiction of the subject matter and that the defendant was duly served with process or voluntarily appeared, the judgment is conclusive and not open to collateral attack. But because of appellant's vacillation, and for greater clearness, it is deemed advisable to set forth the decisions of the court upon this question.

In *Michaels v. Post*, 21 Wall. 398, 22 L. Ed. 520, 525-6, which was a suit instituted by an assignee in bankruptcy under the act of 1867 to recover property alleged to have been preferentially conveyed, the defense assigned was that the proceedings in bankruptcy were void and of no effect. Upon this question Justice Clifford, delivering the opinion of the court, said:

“But the court here is entirely of a different opinion, as the district courts are created by Act of Congress which confers and defines their jurisdiction, from which it follows that decrees rendered in pursuance of the power conferred are entitled in this court to the same force and effect as the judgments or decrees of any domestic tribunal, so long as they remain unreversed or are not annulled.”

. . .

“Power to establish uniform laws upon the subject of bankruptcy throughout the United States is conferred upon Congress, and Congress having exercised the power it has become an exclusive power. By the Act of Congress the juris-

diction to adjudge such insolvent debtors as are described in the 39th section of the act to be bankrupts is vested in the district courts, and it follows that such a judgment is entitled to the same verity, and is no more liable to be impeached collaterally than any other judgments or decrees rendered by courts possessing general jurisdiction, which of itself shows that the case before the court is controlled by the general rule that where it appears that the court had jurisdiction of the subject matter, and that the defendant was duly served with process or voluntarily appeared and made defense, the judgment is conclusive and is not open to any inquiry upon the merits."

"Exactly the same rule is applicable to the case before the court, as it is clear that the District Court had jurisdiction of the petition and that there is not even a suggestion that the notice required by law was not given as the law directs."

"Such a decree adjudging a debtor to be bankrupt is in the nature of a decree *in rem* as respects the *status* of the party, and in case the court rendered it has jurisdiction it is only assailable by a direct proceeding in a competent court, if due notice was given and the adjudication is correct in form."

And the Supreme Court of the United States specifically has reaffirmed this proposition in the following cases:

*Sloan v. Lewis*, 22 Wall. 150; 22 L. Ed. 832-3.

*New Lamp Chimney Co. v. Ansonia Brass & Copper Co.*, 91 U. S. 656; 23 L. Ed. 336, 338-9.

*Chapman v. Brewer*, 114 U. S. 169; 29 L. Ed. 83, 87.

*Graham v. Boston, Hartford & Erie R. R. Co.*, 118 U. S. 161; 30 L. Ed. 196, 204-5

And the same doctrine has been announced by state and federal courts in the following cases:

*Roche v. Fox* (W. Dist. Wis.), Fed. Case 11974; 20 Fed. Cas. 1065, 1066 (first column.)

*Allen & Co. v. Thompson* (D. C. W. Dist. Tenn.), 10 Fed. 116, 120-2.

*Mount v. The Manhattan Co.* (N. J.), 3 Atl. 726, 728-9.

*In re: Mason* (D. C. W. Dist. N. C.), 99 Fed. 256, 257.

*In re: Columbia Real Estate Co.* (D. C. Ind.), 101 Fed. 965, 970-1; 4 Am. B. R. 411.

*Edelstein v. United States* (C. C. A. 8th Cir.), 149 Fed. 636, 638-9; 9 L. R. A. (N. S.) 236, 239.

*Gilbertson v. United States* (C. C. A. 7th Cir.), 168 Fed. 672, 674.

*In re: First National Bank of Belle Fourche* (C. C. A. 8th Cir.), 152 Fed. 64; 18 Am. B. R. 265, 271-3.

*In re: Marion Contract & Construction Co.* (D. C. W. Dist. Ky.), 166 Fed. 618, 620.

And to the same effect are all of the text writers upon bankruptcy.

*Black on Bankruptcy, Sec. 61, p. 41.*

*Collier on Bankruptcy, pp. 23, 24.*

*Loveland on Bankruptcy, Sec. 244, pp. 502-506.*

*Remington on Bankruptcy, Sec. 29, p. 46.*

It therefore may be premised as incontrovertible that the adjudication by a district court in bankruptcy, upon questions of bankruptcy are to be governed by the same rules concerning jurisdiction as govern courts of general jurisdiction.

## JURISDICTION OF COURTS OF GENERAL JURISDICTION.

The best definition of jurisdiction and the clearest exposition of its connotations, it is believed, is that of the New Jersey Supreme Court, occurring in the case of *Munday v. Vail*, 34 N. J. Law, 418. The court said:

“Jurisdiction may be defined to be the right to adjudicate concerning the subject matter in the given case. To constitute this there are three essentials. First, the court must have cognizance of the class of cases to which the one to be adjudged belongs. Second, the proper parties must be present. And third, the point decided must be, in substance and

effect, within the issue. That a court cannot go out of its appointed sphere, and that its action is void with respect to persons who are strangers to its proceedings, are propositions established by a multitude of authorities. A defect in a judgment arising from the fact that the matter decided was not embraced within the issue has not, it would seem, received much judicial consideration. And yet I cannot doubt that, upon general principles, such a defect must avoid a judgment. It is impossible to concede that because A. and B. are parties to a suit, a court can decide any matter in which they are interested, whether such matter be involved in the pending litigation or not. Persons by becoming suitors do not place themselves for all purposes under the control of the court, and it is only over those particular interests which they choose to draw in question that a power of judicial decision arises. If, in an ordinary foreclosure case, a man and his wife being parties, the court of chancery should decree a divorce between them, it would require no argument to convince everyone that such decree, so far as it attempted to affect the matrimonial relation, was void; and yet the only infirmity in such a decree would be found, upon analysis, to arise from the circumstance that the point decided was not within the substance of the pending litigation. In such a case the court would have acted within the field of its authority, and the proper parties would have been present; the single but fatal flaw having been the absence from the record of any issue on the point determined. The invalidity of such a decree does not proceed from any mere ar-

bitrary rule, but it rests entirely on the ground of common justice. A judgment upon a matter outside of the issue must of necessity be altogether arbitrary and unjust, as it concluded a point upon which the parties have not been heard. And it is upon this very ground, that the parties have been heard, or have had the opportunity of a hearing, that the law gives so conclusive an effect to matters adjudicated. And this is the principal reason why judgments become estoppels.”

This quotation was adopted by so final an authority as the Supreme Court of the United States, Mr. Justice Brewer delivering the opinion of the court, in the case of *Reynolds v. Stockton*, 140 U. S. 254, 268, 35 L. Ed., 464, 468-9. It is also approved by Judge Ray in the decision of *In re: Casey* (D. C. N. Y.), 195 Fed. 322, 327-8, and by so authoritative a text writer as *Black on Judgments* (2d Ed.), Section 242, p. 358. Justice Brewer, Judge Ray, and Mr. Black, quote at length from the opinion.

From this exposition it will be seen that if the court has cognizance of the class of cases to which the one to be adjudged belongs, and the proper parties are before it, and the point decided is within the issue, then jurisdiction attaches, and the judgment or adjudication, *however erroneous*, cannot be attacked collaterally.

It is assumed that there will be general acquiescence by counsel for appellant in the principles of law thus far stated, and since there is no dispute concerning juris-

diction of the parties, we may, therefore, proceed with the discussion of jurisdiction of the subject matter.

### JURISDICTION OF THE SUBJECT MATTER.

As pointed out in the discussion of the question of jurisdiction generally, three elements are requisite:

1. The proper *parties* must be before the court.
2. The court must have cognizance of the *class of cases* to which the one to be decided belongs.
3. The *point* decided must be *within the issue*.

The courts usually, in discussing the question of jurisdiction, consolidate the elements 2 and 3 and refer to the same as the power to pass upon the subject matter. So it may be said that *courts have jurisdiction of the subject matter when they have cognizance of the class of cases to which the one to be decided belongs, provided the point to be decided is within the issue raised.*

Cognizance of bankruptcy cases is conferred upon the district courts by Congress under what is generally known as the "Bankruptcy Act," and as we have seen these courts, as to their jurisdiction in bankruptcy, are governed by the same rule as is applied to courts of general jurisdiction, so when a decision is rendered by a bankruptcy court, either adjudicating or refusing

to adjudicate an individual, firm, or corporation, bankrupt, that decision is *within the issue*, therefore, it must follow that an adjudication in bankruptcy of a person or corporation amenable to bankruptcy properly before the court *cannot be questioned collaterally*.

It has been stated by various text writers, and in numerous cases, *obiter dicta* (though no case has been found in which a decision was directly rendered in that regard), that where it is neither alleged nor shown that a person or corporation against whom a petition is filed, was included in the class amenable to the provisions of the bankruptcy act, the court would have no jurisdiction to adjudicate. For example, if it be not alleged or shown that a corporation under the present act is a moneyed, business, or commercial corporation, and not a municipal, railway, insurance, or banking corporation, or if it be not alleged or shown that the person or corporation petitioned against has had its residence, domicile, or place of business within the district, for the greater portion of six months next preceding the filing of the petition, it has been stated, *obiter dicta* by some courts, although not expressly so held, that the court would have no jurisdiction thereof, and that such want of jurisdiction could be taken advantage of in a collateral proceeding, even by one who had participated in the proceedings and benefited thereby. While this position may or may not be a correct view of the question, it has been expressly denied in several cases, the two most prominent of which are *In re: Broadway Savings Trust Co.* (C. C. A. 8th Cir.), 152 Fed. 152, and *In re First National Bank of Belle Fourche* (C. C. A. 8th

*Cir.*), 152 Fed. 64. If, however, the dicta expressed by the former cases be correct, the reason therefor unquestionably is that the point decided was not within the issue because the Bankruptcy Act specifically eliminates from its provisions such corporations or persons, and the court has no more authority to adjudicate them bankrupts than it would have in an admiralty case, for example, to adjudicate a lien upon a residence situated upon land which possibly might adjoin a body of water.

Now, applying the principles thus far promulgated to the case at bar, the corporation adjudged bankrupt was alleged to be, and was, a corporation subject to involuntary bankruptcy; the parties were properly before the court and consequently jurisdiction existed in the District Court for the District of Oregon to adjudicate it bankrupt. Having done so, the adjudication cannot be contested collaterally, although the court may have erroneously determined that a cause of action was properly stated in the petition and in fact existed, since the court had cognizance of the question to be decided and the decision rendered was within the issue, viz.: whether the corporation, amenable to the Bankruptcy Act, should be adjudicated a bankrupt.

The fallacy running through the entire brief of appellant which forms the basis for its conclusion that the court was without jurisdiction in making the adjudication, arises from its assumption that by reason of the failure properly to state a cause of action in the petition, the court obtained no jurisdiction of the subject matter. *It is not a prerequisite to jurisdiction that*

*pleadings should state a cause of action, but merely that the point to be decided should be within the issue.* This is evidently the view of so respectable an authority as Remington, who, in his work on *Bankruptcy*, at page 50, in discussing the decisions of *In re: Broadway Savings Trust Co.*, 152 Fed. 152, and *In re: First National Bank of Belle Fourche*, 152 Fed. 64, heretofore mentioned, referring to the holding that the lack of the allegations, in the involuntary petition, that a corporation was engaged principally in manufacturing, trading, etc., did not defeat the jurisdiction of the court, says:

“However, it would seem that did they (the allegations) pertain simply to the *cause of action*, their non-existence would be waivable.”

The phrase “cause of action” mentioned by Remington, of course, could mean nothing but the act of bankruptcy, since that is the only cause of action properly set forth in a bankruptcy petition.

In the case of *In re: First National Bank of Belle Fourche* (C. C. A. 8th Cir.), 152 Fed. 64, 68; 18 Am. B. R. 265, 271-3, it is said:

“Jurisdiction of the subject matter and of the parties is the right to hear and determine the suit or proceeding in favor of or against the respective parties to it.

The facts essential to invoke this jurisdiction differ materially from those essential to constitute a good cause of action for the relief sought. A defective petition in bankruptcy, or an insufficient complaint at law, accompanied by proper service of process upon the defendants, gives jurisdiction to the court to determine the questions involved in the suit, although it may not contain averments which entitle the complainant to any relief; and it may be the duty of the court to determine either the question of its jurisdiction or the merits of the controversy against the petitioner or plaintiff. Facts indispensable to a favorable adjudication or decree include all those requisite to state a good cause of action, and they comprehend many that are not essential to the jurisdiction of the suit or proceeding.

. . . The jurisdiction of a court is not limited to the power to render correct decisions. It is the power to decide the issues according to its view of the law and the evidence, and its wrong decisions are as conclusive as its right ones. It empowers the court to determine every issue within the scope of its authority, whether its decision is right or wrong, and every judgment or decision so rendered is final and conclusive upon the parties, unless reversed by writ of error or appeal or vacated by some direct proceeding."

Practically the same language was used by the same court in the case of *In re: Plymouth Cordage Co.*, 135 Fed. 1000, 1004.

In *Roche v. Fox* (*W. Dist. Wis.*), *Fed. Case 11974*, *20 Fed. Cas. 1065, 1066* (first column), the court in discussing this phase of the question, makes the following pertinent comments:

“It is claimed that the court has not jurisdiction. Jurisdiction of what? The law gives the court jurisdiction of the subject matter before any petition is filed. And the filing of the petition, the service of process, and the appearance of the alleged bankrupt in the cause, are ample to give jurisdiction of the person. What question of jurisdiction remains? In a certain sense it is true the court has not jurisdiction. It cannot proceed to furnish the relief prayed for upon a petition which is demurrable in not containing all the necessary allegations. And the true force of the objections, to my mind, does not go to the jurisdiction of the court, but only to the sufficiency of the petition as a pleading. The petition in bankruptcy answers to the declaration or complaint in an action at common law, or bill of complaint in equity. Its office is to set forth the cause of action. It was never yet held that a complaint in an action at law or suit in equity should be dismissed for want of jurisdiction in the court, when suit has been commenced by service of process, and an attempt made to set out a cause of action, but the complaint is defective in some particulars in not containing all the essential allegations to make a good case. Such defect would be good ground for demurrer, which, if sustained, leave would be given to amend, which, of course,

could not be done if the court had not jurisdiction. It must in such case dismiss the proceeding."

The Circuit Court of Appeals for the Eighth Circuit, in *Edelstein v. United States*, 149 Fed. 636, 638-9; 9 L. R. A. (N. S.) 236, 239, said:

"The petition of the creditors was in approved form, except that it failed to aver that the bankrupts were not wage-earners or persons engaged chiefly in farming or the tillage of the soil, as required by section 4 of the Bankruptcy Act as amended. For want of such averment, the petition was demurrable, and if timely objection had been made to it no adjudication could have been had upon it. *C. C. Taft Co. v. Century Savings Bank*, 72 C. C. A. 671, 141 Fed. 369; *In re: Plymouth Cordage Co.*, 68 C. C. A. 434, 135 Fed. 1000; *Beach v. Macon Grocery Co.*, 57 C. C. A. 150, 120 Fed. 736; *In re: Taylor*, 42 C. C. A. 1, 102 Fed. 728. But after a hearing was had, an adjudication of bankruptcy made, and the bankrupt, recognizing its validity, had applied for a discharge from his debts, can it be said that such an adjudication, when no person interested has questioned its validity by appeal or otherwise, is void upon collateral attack? We think not. It is true the District Court as a court of bankruptcy is one of limited jurisdiction—that is, limited in respect of the subjects over which it may exercise jurisdiction—but it is unlimited in respect of its power over

proceedings in bankruptcy, specifically made subject to its jurisdiction by section 2 of the act. When judgments are rendered by that court upon questions arising in such proceedings, they possess all the incidents and qualities of finality and conclusiveness appertaining to judgments of courts of general jurisdiction. Its judgments, unless reversed on appeal or writ of error, import absolute verity.

. . . In view of the principles so announced, it must be held that it was the duty of the court of bankruptcy primarily to find the facts, and determine therefrom, as a matter of law, whether it had jurisdiction over the proceeding before it. It performed its duty, reached the conclusion that it had, and pronounced judgment accordingly. Neither the bankrupts nor any other interested party saw fit to challenge the judgment by appeal or otherwise. It therefore became final and conclusive, and is not subject to collateral attack, as attempted in this case."

And to the same effect are the cases of:

*In re: Brett (D. C. N. J.)*, 130 *Fed.* 981-2, 12 *Am. B. R.* 492, 493-5.

*In re: Broadway Savings Trust Co. (C. C. A. 8th Cir.)*, 152 *Fed.* 152, 153, 18 *Am. B. R.* 254.

And *Black* in his work on *Judgments (Second Edition)*, in a note to *Section 248*, p. 370, after quoting numerous cases, says:

“As to questioning the jurisdiction of the court, this cannot be done, if the objection to the jurisdiction concerns the character or number of creditors joining in the petition, *the sufficient allegation of an act of bankruptcy*, or the amount of debts owed by the bankrupt. But there are authorities to the effect that a total want of jurisdiction over the person of the bankrupt may be shown, even collaterally.” (Italics ours.)

#### JURISDICTION—AUTHORITIES CITED BY APPELLANT.

Appellant on p. 11 of his brief quotes from *Loveland on Bankruptcy, Sec. 191*, to the effect that three things must concur in order to justify the institution of involuntary proceedings in bankruptcy: First, the debtor must be of a class amenable to involuntary bankruptcy; second, that he must owe debts to the amount of one thousand dollars or over; and third, that he must have committed an act of bankruptcy within four months of the filing of the petition; and that these three elements are jurisdictional, “and must all exist in order to give the court power to adjudicate the debtor a bankrupt. If any of these three things does not exist the proceeding fails.”

From a reading of the entire section, which is part of a chapter discussing “*Parties, and the Petition in In-*

*voluntary Bankruptcy*," it is clear that Loveland is speaking loosely when he uses the word "jurisdiction" and is not using it in the sense that a judgment rendered by the court could be attacked collaterally were one of these elements lacking. The case cited by Loveland to show that an act of bankruptcy must exist in order to give the court jurisdiction is *In re: Empire Metallic Bedstead Company*, 98 Fed. 981, 3 Am. B. R. 575, which case holds merely that where the act stated in the petition is not an act of bankruptcy and an answer is filed denying that the act was an act of bankruptcy, the petition, after hearing, should be dismissed! And in none of the cases cited under this section as to the other so-called "jurisdictional" elements was the question of the jurisdiction of the court involved collaterally, and in all of them the decision was *upon demurrer or answer in the original proceeding*. So it is clear that Loveland was not using the word "jurisdictional" in its strict or even proper sense in the section quoted by appellant, and the quotation used is not even relevant to this discussion.

Appellant further insists that jurisdiction conferred by the bankruptcy act can operate only when invoked by a proper pleading. Of course, it is conceded that the jurisdiction latent in the bankruptcy court cannot be rendered active until a petition is filed, but it is maintained that when a petition is filed against a person or corporation amenable to the bankruptcy act, then whether the allegations of the petition be demurrable or not, or whether a cause of action be properly stated therein or not, the jurisdiction of the court is awakened

and every activity of the court in the cause resulting in a decision, correct or erroneous, unless taken advantage of by appeal or review or motion to vacate, or other direct proceeding, is forever binding and cannot be collaterally assailed. This question has been settled by many cases, e. g.:

*Roche v. Fox*, *Fed. Case* 11974, 20 *Fed. Cas.* 1065, 1066 (first column.)

*Allen & Co. v. Thompson*, 10 *Fed.* 116, 120.

*In re: Columbia Real Estate Co.* (*D. C. Ind.*), 101 *Fed.* 965, 970.

*In re: Brett* (*D. C. N. J.*), 130 *Fed.* 981.

*In re: First National Bank of Belle Fourche* (*C. C. A. 8th Cir.*), 152 *Fed.* 64; 18 *Am. B. R.* 265, 271,

and need not be further discussed here.

Appellant, upon the question of jurisdiction, on pages 14 to 17 of its brief, cites and quotes *Griffith v. Frazier*, 8 *Cranch*, 9; *In re: Sawyer*, 124 *U. S.* 200; and *Rich v. Mentz Township*, 134 *U. S.* 632, and then concludes as follows:

“We submit, therefore, that the jurisdiction of United States District Courts, sitting as Courts of Bankruptcy, is conferred, defined and limited by the statute, but before a judgment or adjudication can be entered, which will have any effect and be other than a mere nullity, a petition must be filed specifically alleging the commission of an act of bankruptcy.”

The three cases cited by appellant have no relation whatsoever to the question of bankruptcy, and the deduction which is drawn from these decisions by appellant is clearly *a non sequitur*.

In the case of *In re: New York Tunnel Co.*, 166 Fed. 284, cited by appellant on page 21 of its brief, it was held that the court *had* jurisdiction and the petition to review was dismissed, and the language quoted by appellant is mere dicta, with which, however, there is no occasion to dissent since it does not affect the question involved in this case.

In the case of *Elmyra Steel Co.*, 5 Am. B. R. 484, 109 Fed. 456, opinion by Referee Munn, which opinion was adopted by the District Judge, there was a contest as to which of two district courts had jurisdiction of the bankruptcy proceedings. The petition which was filed in one of the courts, viz: that of the Eastern District of Pennsylvania, contained no allegation whatsoever as to the character of the corporation against which it was directed, and the referee held that the lack of averment and proof of the character of the corporation in the petition gave the court no jurisdiction to adjudicate. While this decision has been *criticised and questioned* by the Circuit Court of Appeals for the Eighth Circuit in the case of *In re: First National Bank of Belle Fourche*, 152 Fed. 64, at page 70, it is not seen how the question decided affects the case at bar, wherein the

only question is whether failure properly to allege a *cause of action*, viz: a defective allegation of an act of bankruptcy, deprived the court of all jurisdiction whatsoever over the question at issue.

The pertinency of *In re: Stein*, 130 Fed. 377, (*Eastern District of Pennsylvania*), cited and quoted by appellant at page 24 of its brief, is also not seen. There the District Court for the Eastern District of Pennsylvania held that where the petition showed that the aggregate of the three petitioning creditors' claims was less than five hundred dollars, the court did not have jurisdiction to entertain the same, and upon demurrer the petition was dismissed and an amendment refused. (Even this decision, however, had been criticized by the Circuit Court of Appeals for the Eighth Circuit in the case of *In re: Plymouth Cordage Co.*, 135 Fed. 1000, 1005.)

The case of *Murray v. American Surety Co. of New York*, 70 Fed. 341, cited and quoted by appellant, was a case wherein suit was instituted to recover upon two surety bonds given by a receiver, the receiver having been appointed by the State Court in a statutory proceeding, which gave the court no authority to appoint a receiver, and the court held merely that in a statutory proceeding of that kind the court exceeded its jurisdiction when it appointed a receiver, and therefore it had no jurisdiction so to do: in other words, this case

is again an illustration of a court attempting to do something which was *without* the issue, viz: to appoint a receiver, whereas its only authority under said statute was to direct the bank commissioners to take such proceeding against the bank as should be decided upon by its creditors.

The doctrine of *Settlemeier v. Sullivan*, 97 U. S. 444, 449, and of *Galpin v. Page*, 18 Wall, 366, cited by appellant, is that where the record states the evidence or makes an averment with respect to a jurisdictional fact, it will be taken to speak the whole truth and no presumption will be allowed that different evidence was produced, or that the fact was otherwise than averred. This does not in any manner, however, warrant the inference which appellant draws and seeks to apply to the case at bar, that the proper allegation of a valid act of bankruptcy is jurisdictional.

The appellant, it seems, cannot surrender entirely the view maintained by it in the lower court, that courts of bankruptcy are courts of limited jurisdiction, and this apparently is the reason for the quotation from the *Encyclopedia of United States Supreme Court Reports* appearing on pages 23 and 24 of its brief. This question has already been adverted to at some length. However, it is not deemed amiss to quote at length from a strikingly apposite decision of District Judge Hammond of the District Court of the Western District of

Tennessee, in the case of *Allen & Co. v. Thompson*, 10 Fed. 116, 120-2, which has already been quoted in connection with numerous decisions of the Supreme Court of the United States and of numerous district and state courts. Says Judge Hammond:

“It is sometimes, indeed very often, said loosely that it is never too late to take objection to the jurisdiction of a federal court, and there is not wanting a kind of judicial sanction for the notion that in determining questions of jurisdiction in these courts a more strict rule is to be applied than to other courts, and that they must be treated with that degree of scrutiny that is applied to jurisdiction obtained by extraordinary process, or to that belonging to courts of extraordinary powers. I dissent entirely from this view, and while we are constrained by authority in that class of cases where jealousy of these courts has resulted in very strict construction of their jurisdiction, and the mode of obtaining it, the principle does not at all apply in bankruptcy, admiralty, and other proceedings of which they have exclusive cognizance, so far as pertains to jurisdiction over the persons or *res* involved in the litigation.

Entire want of jurisdiction over the subject-matter may be taken advantage of at any time, and it is never too late to make the objection; and it may be even collaterally attacked. Freeman, Judgments, Sec. 120; Id. Sec. 117 *et seq.* But where the objection goes merely to a want of jurisdiction of the person or the thing, there may be a waiver of the objection

or restrictions as to the time and manner of making it; the judgment becomes not void, but only voidable, and presumptions are indulged in favor of the jurisdiction, unless it be made to appear by direct proceedings that there was a want of it. *Id.* Sec. 124. It is not necessary to go into the technical complications of this subject here, but only to advert to the distinction, that we may have it in mind in considering this case. . . . To my mind the proposition that they (creditors) may come in, prove their debts, choose an assignee, distribute the estate, and take all the benefit of the proceeding they can have, and then when the debtor applies for a discharge object that the court has no jurisdiction to grant it, is intolerable. Why should they not, when notified of the proceeding, in analogy to other cases, make objection to the jurisdiction in the beginning?

And why, if they prove their debts without taking this objection, should they not be considered to have waived it? If it be conceded that, in cases at law or equity, where the record shows a want of jurisdiction on its face the objection may be taken at any time; on the other hand, if it show jurisdiction on the face the showing is conclusive, unless there be an objection taken by plea in abatement or otherwise *in limine*. But I am unwilling, for my part, to extend any principle that would permit a proceeding to be vacated for want of jurisdiction, because the jurisdictional facts do not appear on the face of the pleading to these petitions in bankruptcy. We have entire jurisdiction of the subject-matter, and may acquire jurisdiction of the persons and the *res* under

given conditions; and it does not seem that there should be a presumption in favor of the existence of the conditions and the jurisdiction, unless parties notified at once and in the beginning point out the defects or non-existence of the jurisdictional facts by motion or petition to vacate the adjudication for want of jurisdiction. . . .

I do not, therefore, deem it important to inquire whether the original petition, on its face, gives jurisdiction or not, though I think it defectively states enough on which to predicate jurisdiction, or whether this petition to annul the discharge states enough to show a want of jurisdiction; for, whether the original petition is defective or not, or whether the facts it states are untrue or not, I hold that this creditor having been notified, or having appeared and filed his proof of debt without in any form taking objection to the jurisdiction, has waived that objection, and he cannot now make it at all."

Appellant takes exception to that portion of the opinion of District Judge Wolverton which suggests that the petition might have been amended so as to state a good cause of action, and therefore its adjudication must be held final until vacated by direct attack, especially as the bankrupt itself had admitted insolvency, and prayed for the adjudication. Upon this subject appellant quotes at length from the case of *In re: Louissell Lumber Company*, 209 Fed. 785. In that case there was an involuntary petition filed in the District Court which *did not state or attempt to state any act of bankruptcy*. The petition was filed within

four months of the levying of an attachment by Armour & Company. About eight months after the levying of the attachment, no adjudication having been made, and more than four months after the filing of the original petition, an amended petition was filed, whereupon the court adjudged the Louisell Lumber Company bankrupt and dissolved the Armour & Company lien. Armour & Company thereupon filed a petition for revision of the order dissolving the lien, setting forth the foregoing facts, and asserted a prior lien under the attachments and levies, its contention being that the amendment to the original petition should not relate back to the date of the filing of the original petition so as to bring the proceedings within four months from the date of the levy of the attachment. The court held that the amendment would be allowed but would not relate back where to do so "would have the effect of depriving an adverse party of a substantial right *on which no attack was made in the original pleading.*" However, this is not the situation in the case at bar, since an attack was clearly made upon the attachment of the appellant in the involuntary petition filed, and as appears from the record appellant had his day in court upon the same, and had his opportunity to appeal from the order of the court deciding adversely to his contention. We shall discuss this phase more particularly hereinafter, under the topic "Estoppel."

JURISDICTION — NON-EXISTENCE MUST AFFIRMATIVELY APPEAR ON COLLATERAL ATTACK.

Respondent's position, as already discussed, is that the failure properly to allege a valid act of bankruptcy is not a jurisdictional question, and therefore the court had jurisdiction in fact. Again, it should be noted, (eliminating for the purpose of this phase of the discussion the fact that the validity of the allegation as to the act of bankruptcy is not jurisdictional), that the record itself does not show that the court did *not* have jurisdiction, and it has frequently been held that although the record fails to show jurisdiction, notwithstanding said failure, it will be presumed that the court had jurisdiction, and it is only where the record affirmatively shows that the court did *not* have jurisdiction that in a *colateral* proceeding the jurisdiction can be attacked. In fact, appellant itself quotes with approval, on page 27 of its brief, the following language from Loveland:

“If the record shows a lack of jurisdiction, the adjudication is null and void and may be assailed in a collateral proceeding. In order to render an adjudication void, the *absence* of jurisdiction must *affirmatively* appear on the record.”  
(Italics ours.)

To the same effect see:

- Loveland on Bankruptcy, Sec. 244, p. 503.*  
*Remington on Bankruptcy, Sec. 437, p. 279, 280.*  
*Black on Bankruptcy, Sec. 182, p. 479.*  
*In re: Urban & Suburban Realty Title Co., 132*  
*Fed. 140, 141; 12 Am. B. R. 687.*  
*Allen & Co. v. Thompson (D. C. West. Dist.*  
*Tenn.), 10 Fed. 116, 120-2.*  
*In re: Columbia Real Estate Co. (D. C. Ind.),*  
*101 Fed. 965, 970-1.*  
*In re: First National Bank of Belle Fourche, 18*  
*Am. B. R. 271; 152 Fed. 64.*  
*Edelstein v. United States (C. C. A. 8th Cir.),*  
*149 Fed. 636, 368-9, and*  
*Dowell v. Applegate, 152 U. S. 327, 340,*

where it is observed by Justice Harlan, after reviewing the authorities:

“These cases establish the doctrine that, although the presumption in every stage of a cause in a circuit court of the United States is that the court is without jurisdiction unless the contrary affirmatively appears from the record, yet . . . if such jurisdiction *does not* so appear, the judgment or final decree cannot, for that reason, be collaterally attached, or treated as a nullity.”

The involuntary petition in bankruptcy in the case at bar certainly does not affirmatively show that the court has *no* jurisdiction. It sets forth that the alleged bankrupt had for the greater portion of six months

next preceding the date of the filing of the petition in bankruptcy had its principal place of business in the district; that it owed debts in the amount of more than one thousand dollars; that it was a moneyed, business, or commercial corporation; that the four petitioning creditors had provable claims in excess of five hundred dollars; that the alleged bankrupt was insolvent; and that

“within four months next preceding the date of this petition, the said Consumers’ Lumber & Supply Company committed an act of bankruptcy, in that it allowed Larkin-Green Logging Company to levy an attachment on all of the assets and property of said Consumers’ Lumber & Supply Company, which attachment has never been released or discharged or vacated, and which attachment was levied on December 18, 1912, and will become a prior lien and cannot be removed or set aside or dissolved through bankruptcy proceeding, after April 18, 1913.” (The petition was filed on the 17th day of April, 1913.) “That said Consumers’ Lumber & Supply Company has done nothing to vacate or set aside said attachment and has not gone into bankruptcy voluntarily and its failure to do so will thereby create a preference in favor of said Larkin-Green Logging Company, by reason of the attachment levied by said Larkin-Green Logging Company on said December eighteenth, 1912; said attachment is still a lien on all the assets of said debtors.

That unless said Consumers’ Lumber & Supply Company is adjudicated a bankrupt and unless this petition is filed forth-

with, a preference will be gained and obtained by said Larkin-Green Logging Company as well as by Linnton Savings Bank, which levied a writ of attachment and attached all of the assets of said Consumers' Lumber & Supply Company on December 26th, 1912, and therefore on April 26th, 1913, said Linnton Savings Bank will also obtain a preference, as said Consumers' Lumber & Supply Company has done nothing to set aside said attachment, nor has it filed a voluntary petition in bankruptcy.

That the said obligations owing to said Larkin-Green Logging Company and Linnton Savings Bank are for prior indebtedness which was owing to the said attaching creditors prior to said December 18th, 1912.

That by reason of the foregoing facts said Consumers' Lumber & Supply Company has permitted and suffered a preference in favor of said Larkin-Green Logging Company and Linnton Savings Bank which can only be set aside through an adjudication in bankruptcy, of said Consumers' Lumber & Supply Company."

So that even assuming for the moment that the proper allegations of valid acts of bankruptcy are matters which go to the jurisdiction of the court, which assumption, however, is made only *arguendo*, it is submitted that a reading of the allegation of the acts of bankruptcy in the petition, as set forth above, does not affirmatively show that the debtor had not suffered or

permitted, while insolvent, a creditor to obtain a preference through legal proceedings, and not having at least five days before the sale or final disposition of the property affected by such preference vacated or discharged such preference, as interpreted by the late decision of the United States Supreme Court in the case of *Citizens Banking Company v. Revenna National Bank*, 234 U. S. 360, 34 Sup. Ct. Rep. 806.

Therefore, even if appellant's contention that valid acts of bankruptcy must be properly set forth in the petition in bankruptcy in order to create jurisdiction in the court be correct, it is maintained that the act of bankruptcy as attempted to be set forth in the petition, although faulty upon demurrer, as set forth, does not show affirmatively that *no* act of bankruptcy had been committed.

#### JURISDICTION—CONCLUSION.

Bankruptcy causes in United States courts have been numerous, and have had able and weighty attention by the courts. Numerous cases have been cited herein, wherein it was held that allegations as to the character of the corporation amenable to the Bankruptcy Act; as to the amount of claims held by petitioning creditors; and even allegation as to the question of residence of the bankrupt, have been held *non-juris-*

dictional upon collateral attack. On the other hand, it has *never* been held, nor even stated *obiter dicta* by any court, so far as careful research could show, (and certainly counsel for appellant has not cited any case or authorities to that effect), that the failure to allege a valid act of bankruptcy in an involuntary petition, where the court had rendered an adjudication under such petition, is void *upon collateral attack*, for the reason that the court had no jurisdiction.

Remington, Black, Loveland, and Collier, the four authors and text-book writers upon the subject of bankruptcy, in their voluminous discussion of questions of bankruptcy, have nowhere stated that such a failure to allege a valid act of bankruptcy was a matter of jurisdiction which could be taken advantage of collaterally, and Black, in his work on Judgments, has specifically stated otherwise. (It is true, in a quotation of Loveland heretofore explained, cited by appellant, Loveland loosely uses the word "jurisdiction" in this connection, but from the explanation already made, it is clearly seen that he was not speaking of jurisdiction in its strict and proper sense.)

It is earnestly insisted that the reason why no such case has been found is that the position of appellant is not law.

## ESTOPPEL.

The District Court, Judge Wolverton delivering the opinion, further held that the Larkin-Green Logging Company having, after the overruling of its demurrer to the involuntary petition in bankruptcy and the adjudication, proved its claim as an unsecured creditor, and upon the strength thereof voted for a trustee and participated in the subsequent proceedings, cannot now be heard to question the jurisdiction of the court to make the adjudication, citing:

*In re: Hintze*, 134 Fed. 141.

*In re: Worsham*, 142 Fed. 121.

*In re: New York Tunnel Co.*, 166 Fed. 284.

Said Circuit Judge Hook, in the Worsham case:

“When a bankrupt and all of his creditors have recognized the validity and regularity of proceedings in a court of bankruptcy, have participated therein, and sought the benefit thereof, one of such creditors will not be heard long after the adjudication to object to the jurisdiction of the court upon the ground that the proceedings were instituted in a district in which the bankrupt did not reside or

have his domicile or principal place of business for the greater portion of the preceding six months; nor upon the ground that a subpoena to the bankrupt was not issued, he having voluntarily waived the same and entered his appearance; nor upon the ground that the petition failed to allege that the bankrupt was not a wage earner or a person engaged chiefly in farming or the tillage of the soil. And, for like reasons, he will not be permitted to otherwise contest the petition upon which the adjudication proceeded."

And Judge Hammond, in the case of *Allen & Co. v. Thompson*, 10 Fed. 116, 120-2, (already quoted in another connection) said:

"To my mind the proposition that they (creditors) may come in, prove their debts, choose an assignee, distribute the estate, and take all the benefit of the proceedings they can have, and then when the debtor applies for a discharge object that the court has no jurisdiction to grant it, is intolerable. Why should they not, when notified of the proceeding, in analogy to other cases, make objection to the jurisdiction in the beginning? And why, if they prove their debts without taking this objection, should they not be considered to have waived it."

To the same effect see:

*In re: Mason (D. C. N. C.), 99 Fed. 256, 257.*  
*Loveland on Bankruptcy, Sec. 245, p. 507.*  
*Black on Bankruptcy, Sec. 182, p. 459.*

Appellant devotes much time and energy to the proposition that parties cannot by consent confer jurisdiction on courts, and from this principle, with which we have no quarrel, deduces that appellant cannot be held to have waived or be estopped from attacking the adjudication collaterally.

The error into which the appellant falls in that regard, is two-fold: In the first place, as we believe, as hereinbefore shown, appellant is wrong in its view as to what is jurisdictional in such a proceeding. Aside from that consideration, however, it is wrong because, even assuming, *arguendo*, that the allegation of a valid act of bankruptcy is jurisdictional, its consent would in no wise be claimed to confer the jurisdiction for the adjudication. The appellant is not the bankrupt. The bankrupt could undoubtedly confer jurisdiction by answering, and concurring in the prayer that it be adjudicated a bankrupt. It is, therefore, plainly apparent that conceding everything that appellant claims, the adjudication was unquestionably proper. The appellant was merely a creditor with a claim against the bankrupt, and when it proved its claim it did not, even under its own theory, confer jurisdiction; it merely acquiesced in the course taken by the bankrupt, and waived, *not jurisdiction*, but its right to object to the relating back of the adjudication so as to affect its attachment lien.

Surely there can be no question of the right of a lien creditor to waive its lien and participate as an unsecured creditor. This is what appellant did, and it cannot now be heard after the lapse of a year and a half, and the incurring of heavy expenses incident to the administration of the estate, to change its position so as to deplete the estate of all of its assets. The proof of its claim as an unsecured claim and the waiving of its lien marks the clear distinction between the position of this appellant and that of Armour & Company, in the case of *In re: Louisell Lumber Company*, 209 Fed. 785, on which appellant relies in its attempted answer to Judge Wolverton's reference to the fact that had appellant's demurrer been sustained on revision the petition might have been amended with regard to the allegation of an act of bankruptcy.

## SUMMARY.

I. THE NON-JURISDICTION WHICH RENDERS AN ADJUDICATION SUBJECT TO COLLATERAL ATTACK, IF ANY, IS CONFINED TO THE PARTIES AND THE SUBJECT MATTER AND CANNOT BE SAID TO EXIST WITH REFERENCE TO THE METHOD OF STATING THE CAUSE OF ACTION, WHERE THE PARTIES AND SUBJECT MATTER ARE BEFORE A COURT OF GENERAL JURISDICTION—FOR EXAMPLE, A DISTRICT COURT SITTING IN BANKRUPTCY.

II. THE LACK OF JURISDICTION MUST AFFIRMATIVELY APPEAR IN THE RECORD AND NOT INFERENTIALLY, THE INFERENCE AND PRESUMPTIONS BEING IN FAVOR OF JURISDICTION.

III. IN ANY EVENT THE QUESTION OF JURISDICTION IS NOT PRIMARILY INVOLVED, THE BANKRUPT HAVING ANSWERED, AND THE ADJUDICATION HAVING BEEN MADE UPON THE PETITION OF CREDITORS AND UPON THE ANSWER OF THE ALLEGED BANKRUPT WHICH ADMITTED THE ALLEGATIONS OF THE PETITION AND PRAYED TO BE ADJUDGED A BANKRUPT. THE APPELLANT DID NOT THEREFORE CONFER JURISDICTION, BUT MERELY SUBSEQUENTLY WAIVED ITS LIEN AND PARTICIPATED IN THE PROCEEDINGS AS AN UNSECURED CREDITOR, AND IS NOW ESTOPPED FROM ASSERTING ITS LIEN.

It is therefore urged that the decision of the District Court should in all respects be affirmed.

Respectfully submitted,

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